(21)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

ARLIE COX,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

No. 1126

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit,

and

BRIEF IN SUPPORT THEREOF.

ASA S. CHAPMAN,
C. E. TATE,
Counsel for Petitioner.

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Cases Cited.

Textbooks Cited.

Statutes Cited.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for writ of certiorari from the Circuit Court of Appeals for the Seventh Circuit. The defendant, Cox, was a farmer living at Monticello, Illinois. He was indicted by the federal grand jury in the District Court

of the United States for the Eastern District of Illinois, at Danville, Illinois, on the 7th day of September, A. D. 1944. The indictment contained six counts charging the defendant with violation of Section 1315.801 of Ration Order No. 1A issued November 6, 1942, by the administrator of the Office of Price Administration under the authority conferred upon him pursuant to the provisions of Section 633, Title 50, App., U. S. Code, and Section 2.8 of General Ration Order No. 8 issued March 25, 1943, effective April 15, 1943, by the Office of Price Administration, which was then and there an agency of the United States of America and empowered to issue said Ration Order No. 8 pursuant to Executive Order No. 9125, Directive No. 1, of the War Production Board, and Food Directive No. 3, issued by the Secretary of Agriculture under and pursuant to the provisions of Section 2 (a) (8) of the Second War Powers Act of 1942, Title 50, App., Section 633, U. S. Code.

2.

THE PROCEEDINGS IN THE TRIAL COURT.

The indictment consists of six counts. The first three counts charge the petitioner, Arlie Cox, with a violation of Section 1315.801 of Ration Order No. 1A, issued November 6, 1943, by the Administrator of the Office of Price Administration under the authority conferred upon him pursuant to the provisions of Section 633, Title 50, App., U. S. Code, and the last three counts charge the petitioner, Arlie Cox, with a violation of Section 2.8 of General Ration Order No. 8, issued March 25, 1943, effective April 15, 1943, by the Office of Price Administration, which was then and there an agency of the United States of America and authorized to issue said Ration Order No. 8, pursuant to Executive Order No. 9125, Directive No. 1, of the War Production Board, and Food Directive No. 3, issued by the Secretary of Agriculture under and pursuant to the powers

of Section 2 (a) (8) of the Second War Powers Act of 1942, Title 50, App., Section 633, U. S. Code.

A trial was had and the jury convicted the petitioner on all counts.

The first count in the indictment charges, in substance, that Arlie Cox did willfully and knowingly make a transfer to Roy W. Jones of certain new tires, which said tires were identified by serial numbers 4U803522, 4U729555, 4U671024, and 4U1193877, said transfer not being pursuant to the provisions of Ration Order No. 1A or an order, authorization or regulation issued by the War Production Board.

The second count in the indictment charges, in substance, that Arlie Cox committed the same violation as set up in Count One, by making a transfer of certain new tires, identified by serial numbers 303L2630 and 303L2130 to William Lucker.

The third count in the indictment charges, in substance, that Arlie Cox committed the same violation as set up in Count One, by making a transfer of certain new tires, identified by serial numbers 407T4459, 264T3159, 393E6119 and 261T6959, to Wayne Hanselman.

The fourth count in the indictment charges, in substance, that Arlie Cox did willfully and knowingly on or about the 1st day of January, A. D. 1944, sell to one Roy W. Jones a certain rationed commodity, to wit: four 700 x 16 Appollo Supreme Grade 1 tires, bearing serial numbers 4U803522, 4U729555, 4U671024, and 4U1193877, not pursuant to or in accordance with the provisions of a ration order therefor, the said defendant-appellant then and there well knowing that he had not acquired said rationed commodities in accordance with the rules and regulations issued by the Office of Price Administration and was without right and authority to sell the same.

The fifth count in the indictment charges, in substance, that the same violation as set up in Count Four was committed by Arlie Cox in the sale of certain tires to William Lucker, said tires identified in Count Two.

The sixth count in the indictment charges, in substance, that the same violation as set up in Count Four was committed by Arlie Cox in the sale of certain tires to Wayne Hanselman, said tires identified in Count Three (T. of R., pp. 2-6; Rec. pp. 4-10).

Arlie Cox entered a Plea of Not Guilty October 11, 1944, to the indictment (T. of R. p. 7; Rec. p. 12).

On October 3, A. D. 1944, the Court overruled the Motion to Quash Indictment and denied the Motion to Compel United States Attorney to Elect (T. of R. p. 11; Rec. p. 22).

The Jury was empaneled to try this case (T. of R. p. 15; Rec. pp. 30-31) and on the same day, before the Jury heretofore empaneled, and the trial commenced. At the conclusion of all the evidence the petitioner, Arlie Cox, moved for a directed verdict, which was denied and to which ruling of the court, the petitioner, by his counsel, duly excepted (T. of R. p. 97; Rec. p. 158).

The court then instructed the Jury (T. of R. pp. 71-76; Rec. pp. 124-133).

The Judge ordered the Jury to remain in the courtroom and ordered the courtroom cleared, not permitting the Judge to retire (T. of R. p. 76; R. p. 133).

The Judge returned in open court the following verdict:

> "We, the Jury in this case, find the defendant, Arlie Cox, Guilty in manner and form as charged in the indictment in said case, and each count thereof" (T. of R. p. 98; Rec. p. 160).

Thereafter, on the 14th day of October, A. D. 1944, petitioner filed his Motion in Arrest of Judgment (T. of R. p. 99; Rec. pp. 161-162).

Thereafter, on the same day, petitioner filed his Motion for New Trial (T. of R. pp. 100-102, 163-167).

Thereafter, on the 18th day of October, 1944, Motion in Arrest of Judgment and Motion for a New Trial were overruled, to which said rulings of the court the petitioner, by counsel, duly excepted (T. of R. pp. 104-115; Rec. pp. 171 and 189).

3.

THE EVIDENCE AND TRIAL.

Arlie Cox was shown by the evidence to be a farmer or livestock dealer living near Monticello, Illinois. All of the witnesses testifying for the government were farmers. All of them testified that they owned farm implements, trucks and tractors. The evidence showed that all of the witnesses who testified on behalf of the government had been previously indicted by the United States Grand Jury for the Eastern District of Illinois, had been arraigned and pleaded guilty and paid a fine. The ration regulations in force at the time of the alleged offense prohibited the transfer of "new" Grade 1 automobile tires.

Throughout the reception of the evidence and the instructions to the jury the court and witnesses used the word **"new"** with reference to the tires in its ordinary accepted English meaning.

The word **"new,"** as defined by the Office of Price Administration, was as follows:

> 1315.201 (19) "New" as applied to tires and tubes means a tire or tube that has been used less than one thousand miles.

Plaintiff's counsel offered to tender an instruction to the jury defining the word "new" in the language of the Office of Price Administration, but this court refused. Likewise, the Circuit Court of Appeals in its decision has considered the word "new" in a similar manner.

In the reception of the evidence several tires were received which bore numbers and designations at variance without the numbers written on the tires (T. of R. p. 75).

The District Court and Circuit Court of Appeals have held that this variance was not a substantial variance. We contend that it was a substantial variance, because if the situation was reversed a citizen attempting to obtain tires from the Office of Price Administration would be bound by the numbers on the tires which he had on his automobile.

The court in his instructions to the jury refused to define what constitutes "wilful" violation of the ration regulations. The indictment alleged and the regulations required a "wilful and knowing" violation. The court invaded the province of the jury by narrowing the issue to a question of whether or not there had been a sale of tires without ration certificates entirely omitting the requirement that the violation be a wilful knowing violation.

4.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is invoked under Section 240A of the Judicial Code (28 USC 347). The Circuit Court of Appeals has in this case decided federal questions which have not been and should be settled by this court [Sup. court Rule 38 (5) (B) as amended by the Act of February 13, 1925]. Judgment was entered in this case by the United States Circuit Court of Appeals for the Seventh Circuit on March 5, 1945.

5.

QUESTIONS PRESENTED.

1. The first question presented is sufficiency of the indictment. We refer to the general rule that an indictment need not negative exceptions unless the statute or regulations are so drawn that it is necessary to do so in order to state an offense.

2. The second question presented is whether the defendant was deprived of a fair and impartial trial or whether the court so violated the federal rules or criminal procedure by admitting evidence at variance with the allegations of the indictment over the objection at variance to the indictment and the evidence and that the defendant was deprived of a fair and impartial trial.

3. The third question presented involves a question which has not been decided by this court in connection with rationing regulations which should be decided, namely, what constitutes a wilful and knowing violation of ration regulations? The word "wilful" is used in a great many statutes and has been considered by the court in connection with income tax violations, postal violations and many others, but no decision of this court has been rendered in connection with the term "wilful and knowing" violation as used in the ration regulations.

4. The fourth question presented is whether the trial court and Circuit Court of Appeals correctly instructed the jury as to what constitutes a variance, that is, a substantial variance?

5. The fifth question presented is whether the trial court erred in expressing his opinion as to the evidence and whether he invaded the province of the jury in so doing.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

A substantial federal question presents itself with respect to the use of the term "wilful and knowing" violation of ration regulations. This question has not been heretofore determined by this court.

So far as petitioner is informed, this case presents for the first time the question as to whether a district court may determine as a question of law whether there is a wilful and knowing violation of ration regulations or whether it remains a fact for the jury to determine.

This court has held in Murdock v. U. S., 290 U. S. 389, 398, 78 L. Ed. 381-387, that wilfulness implied not only the knowledge of a thing, but a determination with a bad intention to omit doing it.

The provisions of the ration regulations require that there be a wilful and knowing violation in order to base a prosecution. The word "wilful" in the ration regulations assumes peculiar importance because of the fact that ration regulations are subject to so many changes. The grades of tires, the kinds of tires, the sizes of tires, the construction of tires and all of the various features of the tires are subject to regulations and thousands of regulations are issued concerning these. Then, too, General Order No. 8, which is alleged in the last three counts of the indictment, invokes not only rationed tires but many other products. Inasmuch as citizens generally acquire knowledge of ration regulations solely from newspapers and radio publicity, and inasmuch as it is presumed that citizens have knowledge of the ration regulations, it is important in criminal trials that the jury be accurately and correctly instructed. For instance, one ration regula-

tion provides that automobiles shall not be driven faster than thirty-five miles per hour, excepting in certain instances, and a penitentiary offense is provided in the event such regulation is violated; it can readily be seen that there might be a violation of such regulation on many occasions without the same being wilful.

The word "wilful" is used in so many instances in the statute that it is important to all the people that its use in the ration regulations be defined and determined, otherwise there may be a multiplicity of criminal prosecutions which are unfounded and many persons Congress never intended to be indicted might still be subject to indictment, although it is important to the American people generally that the high regard which has been held for the Government be preserved rather than undermined by having all the people at all times subject to criminal prosecution for acts which might and do occur every day in connection with ration regulations. If the court would by judicial determination define the term "wilful" in a limited way, there would be a greater safeguard for American liberty.

Another reason relied upon for the granting of writ of certiorari is the conducting of the case by the trial court both in instructions and in the reception of evidence. The trial court invaded the province of the jury and misconstrued the ration regulations and he refused to instruct the jury as to the meaning of the ration regulations and at the hearing before the Circuit Court of Appeals admitted that he did not know what were the regulations. The trial court likewise erroneously refused to quash the indictment. There are many other reasons in support of the general rule of law that the government is not compelled to allege exceptions or negative exceptions in an ordinary indictment. But in a case such as this, the gov-

ernment is in a much more favorable position to prove that the articles were not within the exceptions than is the defendant. The government is in exactly the same position in a ration regulation as it was in the enforcement of the laws relating to the transportation of gold and gold products, and in Fuller v. United States, 114 Fed. (2d) 698, it was held that certain gold products should be negatived in the indictment. Rubber products should be no different than gold products.

As was said by this Honorable Court in Yakus v. United States of America, decided March 27, 1944, and appearing in 88 L. Ed. 653:

> "It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial."

We submit that several questions have been raised in this criminal trial which ought to be decided by this court, and while we recognize that the court is overburdened with work at the present time, we believe it is important to all persons that the questions raised in this petition be decided by this Honorable Court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this court a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket "No. 8707, The United States of America, plaintiff-appellee, v. Arlie Cox, defendant-appellant," to the end that this cause may be remanded and determined by this court as provided for by the statutes of

the United States and that the judgment herein of said Circuit Court of Appeals for the Seventh Circuit be reversed by this court, and have such further relief as to the court may seem proper.

Dated April 2, 1945.

ARLIE COX,

By ASA S. CHAPMAN,
C. E. TATE,
Counsel for Petitioner.